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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 ROBERT TODD APPLGATE,

8 Plaintiff,

9 vs.

10 COMMISSIONER OF SOCIAL

11 SECURITY,

12 Defendant.

No. 4:16-cv-05059-FVS

REPORT AND
RECOMMENDATION TO GRANT
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DENY DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

ECF Nos. 13, 16

13 BEFORE THE COURT are the parties' cross-motions for summary
14 judgment. ECF Nos. 13, 16. This matter has been referred to the undersigned
15 magistrate judge for issuance of a report and recommendation. ECF Nos. 14, 19.
16 The Court, having reviewed the administrative record and the parties' briefing, is
17 fully informed. For the reasons discussed below, IT IS RECOMMENDED
18 Plaintiff's Motion (ECF No. 13) be granted and Defendant's Motion (ECF No. 16)
19 be denied.

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
12 §§ 404.1520(c); 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
4 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
5 analysis.

6 At step four, the Commissioner considers whether, in view of the claimant's
7 RFC, the claimant is capable of performing work that he or she has performed in
8 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
9 If the claimant is capable of performing past relevant work, the Commissioner
10 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
11 If the claimant is incapable of performing such work, the analysis proceeds to step
12 five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
16 the Commissioner must also consider vocational factors such as the claimant's age,
17 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
18 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
8 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 Plaintiff applied for Title II disability income benefits and Title XVI
11 supplemental security income on September 19, 2012. Tr. 96, 235-41, 256.
12 Plaintiff alleged an onset date of May 1, 2005. Tr. 235, 256. The application was
13 denied initially, Tr. 156-62, and on reconsideration, Tr. 165-68. Plaintiff appeared
14 at a hearing before an administrative law judge (ALJ) on September 10, 2014. Tr.
15 50-93. On November 4, 2014, the ALJ denied Plaintiff’s claim. Tr. 25-36.

16 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has
17 not engaged in substantial gainful activity since May 1, 2005, the alleged onset
18 date. Tr. 27. At step two, the ALJ found Plaintiff has the following severe
19 impairments: asthma, mast cell activation syndrome; attention deficit disorder;
20 depression; and anxiety disorder. Tr. 27. At step three, the ALJ found Plaintiff

1 does not have an impairment or combination of impairments that meets or
2 medically equals the severity of a listed impairment. Tr. 28. The ALJ then
3 concluded that Plaintiff has the RFC to perform medium work with the following
4 additional limitations:

5 [He] can frequently stoop, kneel, crouch, crawl, and balance. He is
6 limited to occasional climbing of ladders, ropes, and scaffolds, but
7 climbing of ramps and stairs can be done on a frequent basis. The
8 claimant can reach overhead with his left upper extremity on an
9 occasional basis, and reaching in all other directions with his left
10 upper extremity is frequent. He must avoid concentrated exposure to
11 extreme temperatures and pulmonary irritants. The claimant is able to
12 understand, remember, and carry out simple, routine, repetitive tasks
and instructions and he is able to maintain attention and concentration
on simple, routine, repetitive tasks for two hour intervals between
regularly scheduled breaks. The claimant can maintain a productive
pace over a forty hour work week on simple, routine, repetitive tasks.
Finally, the claimant can have no interaction with the public and only
superficial interaction (defined as non-collaborative) with his co-
workers in no more than small groups.

13 Tr. 30.

14 At step four, the ALJ found Plaintiff is unable to perform any past relevant
15 work. Tr. 35. At step five, after considering the testimony of a vocational expert,
16 the ALJ found there are jobs that exist in significant numbers in the national
17 economy that Plaintiff can perform, such as small products assembler, checker, or
18 inspector/packer. Tr. 36. Thus, the ALJ concluded Plaintiff has not been under a
19 disability from May 1, 2005, through the date of the decision. Tr. 36.

1 On March 4, 2016, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-5, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him disability income benefits under Title II and supplemental security income
7 under Title XVI of the Social Security Act. Plaintiff raises the following issues for
8 review:

- 9 1. Whether the ALJ adequately developed the record;
 - 10 2. Whether the ALJ properly found Plaintiff less than fully credible; and
 - 11 3. Whether the ALJ properly evaluated the medical opinion evidence.
- 12 ECF No. 13 at 5-20.

13 DISCUSSION

14 A. Duty to Develop the Record

15 Plaintiff contends the ALJ failed to properly develop the record regarding
16 mast cell activation syndrome and his mental impairments. ECF No. 13 at 5-9. In
17 Social Security cases, the ALJ has a special duty to develop the record fully and
18 fairly and to ensure that the claimant's interests are considered, even when the
19 claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
20 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). The

1 regulations provide that if the evidence is insufficient or inconclusive regarding the
2 disability determination, the ALJ may attempt to obtain additional evidence. 20
3 C.F.R. §§ 404.1520b, 416.920b;¹ *see also* 20 C.F.R. §§ 404.1519a, 416.919a.
4 Ambiguous evidence, or the ALJ's own finding that the record is inadequate to
5 allow for proper evaluation of the evidence, triggers the ALJ's duty to "conduct an
6 appropriate inquiry." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996);
7 *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d 587, 590 (9th Cir.1998).

8 1. *Minh Vu, M.D.*

9 Plaintiff contends the ALJ should have sent additional medical evidence to
10 the medical expert, Minh Vu, M.D., regarding Plaintiff's mast cell syndrome. ECF
11 No. 13 at 5-7. Dr. Vu testified that the impairments of record include complaints
12 about the major joints, hypertension, asthma, and gastrointestinal complaints. Tr.
13 57. He recommended a medium work restriction for respiratory issues like
14 exposure to dust and fumes. Tr. 57. Dr. Vu testified that although he accepted the
15 diagnosis of mastocytosis, he found no limitations arising from the condition
16 _____

17 ¹ These regulations were revised effective March 17, 2017. Revisions to Rules
18 Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5867 (January 18,
19 2017). Since the revision was not effective at the time of the ALJ's decision, it
20 does not apply to this case.

1 because he did not identify any objective findings indicating the severity of
2 Plaintiff's symptoms.² Tr. 59-61.

3 After the hearing, Plaintiff's counsel sent the ALJ a letter dated September
4 16, 2014, from James Cunningham, M.D., the treating oncologist, which discussed
5 the objective evidence of Plaintiff's mastocytosis. Tr. 221-22, 682. Dr.
6 Cunningham noted that mastocytosis is a "comparatively recently discovered
7 diagnostic category" and mast cell disorder syndrome is "a functional impairment
8 in the immune systems [sic] ability to moderate the response of [] inflammatory
9 cells to provocative stimuli." Tr. 682. Dr. Cunningham indicated objective test
10 results confirm Plaintiff's abnormal mast cell response to provocative stimuli. Tr.
11 682. Plaintiff also provided a progress notes from his allergist, Dr. Amirzadeh,
12 dated September 17, 2014, noting Plaintiff's symptoms and including a journal
13 article about mast cell activation syndrome. Tr. 221-22, 683-96.

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16 ² Dr. Vu testified, "he has mastocytosis, which I don't argue with that. . . . It
17 doesn't [inaudible] how severely. Can you find some more to the severity of the
18 problem. . . . show me where they're talking about objective findings about the
19 severity. Does it make the patient - - I mean, show me something physical, okay?"
20 Tr. 60-61.

1 Plaintiff contends the ALJ should have sent the post-hearing evidence to Dr.
2 Vu because it addresses his questions about objective evidence regarding mast cell
3 activation syndrome. ECF No. 13 at 6-7. Plaintiff also suggests Dr. Vu's
4 testimony indicates a lack of understanding about mast cell activation syndrome
5 since he did not identify it as a severe impairment. ECF No. 13 at 7. The Court
6 agrees. Dr. Vu did not assess any limitations arising from mast cell activation
7 syndrome or even identify it as a severe impairment, which is inconsistent with the
8 evidence and the ALJ's own findings.³ Included in the record reviewed by Dr. Vu
9 was Dr. Cunningham's progress note dated May 28, 2013, which indicates his
10 assessment was "[c]linical findings consistent with mast cell activation syndrome"
11 as well as a discussion of those findings. Tr. 491-92. The post-hearing evidence
12 further explains the condition and suggests Dr. Vu's questions about objective
13 findings could be answered by reviewing such evidence. Since Dr. Vu's opinion is
14 inconsistent with evidence in the record, and because the ALJ relied on it in part in
15 finding Plaintiff not disabled, the decision is based on an ambiguity in the

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17 ³ Although the ALJ assigned significant weight to Dr. Vu's opinion, the ALJ also
18 noted, "the residual functional capacity assessed in this decision is more limited
19 than that of Dr. Vu as I find that this is more consistent with the claimant's level of
20 functioning." Tr. 32.

1 evidence. Thus, the matter must be remanded for an updated opinion from Dr. Vu
2 or another qualified medical expert based on the additional evidence regarding
3 mast cell activation syndrome.⁴

4 2. *Donna Veraldi, Ph.D.*

5 Plaintiff contends the ALJ should have sent counseling records to the
6 psychological expert, Dr. Veraldi, and should have requested an updated opinion.
7 ECF No. 13 at 8-9. Dr. Veraldi testified there is evidence of attention deficit
8 disorder, depression, and anxiety disorder in the record. Tr. 65-66. She testified
9 Plaintiff can perform simple, routine, repetitive tasks; he can maintain attention
10 and concentration for two-hour intervals between regularly scheduled breaks; he
11 might have a problem with pace but there is no mental health condition preventing
12 him from being productive enough to maintain a job; and he should avoid the
13 general public but can have superficial, non-collaborative-type interactions with
14 coworkers as long as they are in small groups. Tr. 69-70.

15 However, at the hearing, it came out that Plaintiff had participated in
16 counseling for two years, although none of those treatment records had been

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18 ⁴ Plaintiff also contends Dr. Vu's testimony as to equivalence at step three was
19 inadequate. ECF No. 13 at 7. Regardless, on remand, the ALJ should ensure
20 substantial evidence supports the step three finding.

1 provided to the ALJ or Dr. Veraldi. Tr. 64-65. When Dr. Veraldi was informed
2 that Plaintiff had sought treatment but the records were not part of case file, she
3 said, “that does sort of leave me at a loss, ‘cause this is a person who seeks
4 counseling, and the counseling would give us some idea of sort of current
5 functioning.” Tr. 65. Regarding Plaintiff’s depression, Dr. Veraldi testified, “[s]o
6 it is possible with medication and, apparently, the long-term counseling is
7 stabilizing that. It is hard for me to know without maybe seeing the counseling
8 records.” Tr. 66. She agreed that the most recent counseling records would
9 helpful in fully assessing Plaintiff’s mental health condition. Tr. 72.

10 At the conclusion of the hearing, the ALJ stated, “[h]opefully [counsel] can
11 get those records from the Counseling Center to me before I get this decision
12 issued, and then I’ll have an opportunity to review those as part of my decision.”
13 Tr. 92. Indeed, Plaintiff provided the ALJ with counseling records from the Walla
14 Walla Department of Human services for December 2012 to June 2014. Tr. 697-
15 776. Plaintiff argues that, in light of Dr. Veraldi’s comments that it is “hard for me
16 to know” (Tr. 66) and that she was “sort of at a loss” (Tr. 65) regarding functional
17 limitations without seeing the counseling records, the ALJ should have forwarded
18 the records to Dr. Veraldi for an updated opinion. ECF No. 13 at 8-9; ECF No. 17
19 at 2. Defendant argues the ALJ reasonably determined Dr. Veraldi’s opinion was
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1 consistent with the record, including the counseling records submitted after the
2 hearing. ECF No. 16 at 14; Tr. 32.

3 The Court agrees with Plaintiff. An ALJ is not free to ignore a medical
4 expert's equivocation or concern about the lack of a complete record upon which
5 to assess an impairment, nor may the ALJ ignore a specific recommendation that a
6 more detailed report be obtained from a treating provider. *See Tonapetyan*, 242
7 F.3d at 1150–51. Dr. Veraldi specifically stated that the counseling records would
8 help her make an accurate functional assessment and suggested that her findings
9 were speculative without them. As such, as Plaintiff suggests, the ALJ should
10 have developed the record by forwarding the counseling records to Dr. Veraldi and
11 obtaining an updated opinion regarding Plaintiff's mental health limitations. On
12 remand, the ALJ should obtain an updated opinion from Dr. Veraldi or another
13 qualified expert.

14 The Court concludes that in light of the foregoing, a new sequential
15 evaluation is necessary on remand to take into account the updated expert opinions
16 and any additional relevant evidence. Additionally, evidence submitted to the
17 Appeals Council clarifying the opinion of C. Barton Moore, M.D., should be
18 considered by the ALJ throughout the sequential evaluation. Tr. 811. As such, the
19 Court declines to reach Plaintiff's other assignments of error.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, this Court concludes the
3 ALJ's decision is not supported by substantial evidence and free of harmful legal
4 error. On remand, the ALJ shall develop the record by obtaining updated medical
5 and psychological expert evidence based on the full record and any additional
6 relevant evidence, as is appropriate. The ALJ shall conduct a new sequential
7 evaluation based on the newly developed record. Accordingly, **IT IS HEREBY**
8 **RECOMMENDED:**

9 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, be GRANTED.

10 2. Defendant's Motion for Summary Judgment, ECF No. 16, be DENIED.

11 **OBJECTIONS**

12 Any party may object to a magistrate judge's proposed findings,
13 recommendations or report within **fourteen (14)** days following service with a
14 copy thereof. Such party shall file written objections with the Clerk of the Court
15 and serve objections on all parties, specifically identifying the portions to which
16 objection is being made, and the basis therefor. Any response to the objection
17 shall be filed within **fourteen (14)** days after receipt of the objection. Attention is
18 directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of
19 service.

1 A district judge will make a *de novo* determination of those portions to
2 which objection is made and may accept, reject or modify the magistrate judge's
3 determination. The judge need not conduct a new hearing or hear arguments and
4 may consider the magistrate judge's record and make an independent
5 determination thereon. The judge may, but is not required to, accept or consider
6 additional evidence, or may recommit the matter to the magistrate judge with
7 instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C.
8 § 636(b)(1)(B) and (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern
9 District of Washington.

10 A magistrate judge's recommendation cannot be appealed to a court of
11 appeals; only the district judge's order or judgment can be appealed.

12 The District Court Executive is directed to enter this Report and
13 Recommendation, forward a copy to counsel, and **SET A CASE**
14 **MANAGEMENT DEADLINE ACCORDINGLY.**

15 DATED August 14, 2017.

16 s/Mary K. Dimke
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
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